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ABSTRACT

The admissions decisions of a university are one of its four "essential freedoms," and the courts, as a general rule, defer to universities' judgments regarding academic decisions. In many cases, the courts have said that admissions standards cannot be high-handed, arbitrary, or formulated in bad faith, and they must fall within constitutionally permissible parameters. The two areas that have been challenged in the use of standardized test are equal protection and due process. The implication of challenges to the use of standardized tests is that universities must show a reasonable relationship between their practice and their conceded purpose. In response to concerns about bias in standardized tests against ethnic minorities and women, the courts basically have said that standardized tests should not be the sole criteria for admission to a university. Administrators who wish to protect themselves from litigation should not use standardized tests as a very important part of the admissions process. (Contains 24 references.) (SLD)

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Running head: STANDARDIZED TESTS

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The Legal Implications Of Using Standardized Tests in Admissions

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When the College Board introduced the Scholastic Aptitude Test [SAT] in 1926, little did they know that standardized testing would be fraught with such controversy (Haney, 1981). How could the College Board have seen that after WWII, when they merged with the Carnegie Foundation and the American Council on Education to form the Educational Testing Service [ETS], they would become one of the largest testing organizations on the planet? After WWII, soldiers applied to colleges in record numbers, requiring universities to find more efficient ways to make admissions decisions. With the development of high speed computing for standardized tests, large scale testing gave universities just what they needed to make these more efficient decisions. But, it would not be long until the use of these tests came under fire (Harrington, 1980).

The first real critic of standardized tests was Banesh Hoffman. In March of 1961, Hoffman wrote an article in Harper's magazine called "The Tyranny of Testing," where he claimed that multiple choice tests penalize deep thinkers (Haney, 1981). He also said that over-confidence in objective tests could have "dangerous consequences, not only for education, but for the strength and validity of the nation" (Hoffman, 1961, p. 37). These criticisms and others led to the Senate and House Committee hearings on standardized testing in 1965. These hearings were concerned

with all aspects of psychological testing, but particularly focused on testing for college admissions (Harrington, 1980). The result of these hearings was a debate that continues today over the predictive validity of test information (Haney, 1981).

Perhaps the most aggressive revolt against testing and predictive validity came in the late 70's and early 80's (Sacks, 1997) when Ralph Nader appeared on the Johnny Carson Show to publicize his report on ETS (Haney, 1981). The report, titled "The Reign of ETS" (Sacks, 1997), criticized the power of the SAT and the Law School Admissions Test [LSAT] to predict how well students will do in school (Haney, 1981, and Harrington, 1980). He also reported that the SAT and the LSAT are biased against minority students and lower income students (Haney, 1981); this event marked the beginning of a serious concern over the use of standardized tests in admissions.

About the same time the Nader report came out, New York passed its Truth-in-Testing Law. This law was an effort to regulate standardized testing and to hold test publishers accountable. One of the reasons why this law was passed involved the limited validity of test scores to predict future educational attainment and job performance. Another reason was that test scores were (and still are) highly correlated with social and economic class (Sacks, 1997).

These two issues, predictive validity and test bias, continue to fuel much of the debate regarding the use of standardized tests. In fact, according to Sacks (Sacks, 1997, p. 26):

> Much of research confirms that tests thwart rather than help educational reform and that they continue to produce inaccurate- if not biased- assessments of the abilities of many Americans.

The present paper will focus on the legal implications of using standardized tests in admissions through: a thorough review of the case law regarding admissions and testing, an explanation of what standardized tests can and cannot do in light of the case law, and a presentation of implications for administrators.

Case Law Regarding Testing and Admissions

The admissions decisions of a university are one of its "four essential freedoms." In *Wirsing v. Board of Regents of University of Colorado*, the court found that a university, within the concept of academic freedom, has the freedom to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study (739 F.Supp. 551, (D. Colo. 1990)). The courts, as a general rule, defer to universities' judgment regarding academic decisions. In fact, in case after case, the courts have said basically two things in

regards to admissions practices: (1) admissions standards cannot be high-handed, arbitrary, irrational, capricious, or formulated in bad faith; and (2) admissions standards must be within constitutionally permissible parameters.

In *Matter of Levy*, the court stated, "academic matters are subject to judicial scrutiny, but the issue reviewed is limited to whether the institution acted in good faith or whether its action was arbitrary or irrational" (450 N.Y. S.2d 574, (N.Y.A.D. 1982)). A similar ruling was handed down in *Knight v. State of Alabama* (787 F.Supp. 1030, (N.D. Ala. 1991)):

> It is not the function of the courts to establish the academic mission for any particular educational institution and in the absence of an impermissible impact on black students, federal court will not usurp the traditional role of the university to establish the standards under which those who wish to enroll are admitted.

In *North v. West Virginia Board of Regents*, the court found that as long as the conduct of educators is not "…high-handed, arbitrary or capricious, educators should be left alone to do their job without interference from the judiciary, which has neither the expertise nor insight to evaluate their decisions" (332 S.E.2d 141, (W.Va. 1985)).

In *Enns v. Board of Regents of University of Washington* (650 P.2d 1113, (Wash. App. 1982)), the court held that, "decisions by a University should not be interfered with by the courts unless the action is arbitrary and capricious or taken in bad faith." In *Martin v. Helstad* (578 F.Supp. 1473,(D.C. Wis. 1983)), the court stated, "as long as admission standards remain within constitutionally permissible parameters, it is exclusively within province of higher educational institutions to establish criteria for admissions."

The previous decisions greatly limit the liability of using standardized tests in admissions to two potential areas of litigation: equal protection and due process. These are the two areas that have been challenged to this point and will continue to be challenged. One of the questions still before the courts is whether or not students who are denied admission have a liberty or property interest under the Fourteenth Amendment due process clause, which says that states shall not "deprive any person of life, liberty, or property without due process of law" (U.S. Constitution, Amend. XIV).

Whether or not admission is a property or liberty interest largely depends on the actions of the university. In *Phelps v. Washburn University* the court ruled that "admission to a professional school is a privilege and is

not, standing alone, a constitutional property, *subject to the exception that the rules and regulations for admission are not discriminatory, arbitrary or unreasonable*" [emphasis added] (634 F.Supp. 556, (D. Kan. 1986)).

Grove v. Ohio had a much more liberal opinion. The court ruled that the plaintiff had a liberty interest in being able to practice his chosen profession and the action of the University in denying him admission deprived him of his liberty interest (424 F.Supp. 377, (U.S.D.C. S.D. Ohio, E.D., 1976)). Another case involving due process focused on academic policy and accepted academic norms. The court found, in *Betts v. Rector*, that a substantial departure from academic norms could create a violation of substantive due process (939 F.Supp. 461, (W.D.Va. 1996)).

The second area of litigation focuses on the equal protection clause of the Fourteenth Amendment, which states that no state shall "deny any person within its jurisdiction the equal protection of the laws" (U.S. Constitution, Amend. XIV). The two classes protected under the equal protection clause that are most affected by standardized testing and admissions are ethnic minorities and women. Policies affecting protected classes are held to a different standard under the equal protection clause than they are under the due process clause. Under due process, the universities' policies must not be arbitrary or capricious. Under the

equal protection clause, the universities must find a compelling state interest to enact policies that have an adverse impact on the protected groups.

The implications for universities, as described in *Cannon v. University of Chicago* (709 F.Supp. 361,(S. Ct. 1979), is that universities must show a *reasonable* relationship between their practice and their conceded purpose (Vaseleck, 1994). In *Eiseman v. State of New York*, the court went so far as to require admissions personnel to formulate criteria for admissions that will select students who, by their background and abilities would have the greatest likelihood of successful matriculation (489 N.Y. S.2d 957, (N.Y.A.D. 4 dept. 1985)).

Perhaps the most challenged area of litigation involving equal protection and admissions centers around the use of the American College Testing Program's ACT exam. Time and again the ACT test has been shown to be biased toward ethnic minorities and women (*Groves v. Alabama State Board of Education*, 776 F.Supp. 1518, (U.S.D.C., M.D. Alabama, N.D. 1991), *Knight v. State of Alabama*, 787 F.Supp. 1030, (N.D. Ala. 1991). , and *Ayers v. Allain*, 674 F.Supp. 1523, (N.D. Miss. 1987)). In *Groves v. Alabama State Board of Education*, the court found that the use of ACT cutoff scores had a *negative racial impact with no educational justification.*

Perhaps the landmark case regarding the use of ACT scores for admission is *Knight v. State of Alabama*. The court ruled that although the ACT has a negative impact on the opportunities of black students to attend some of the historically white universities in Alabama, it does not alone constitutionally infirm the use of the test (787 F.Supp. 1030, (N.D. Ala. 1991)).

A similar ruling came in the *Ayers v. Allain* case when the court ruled that ACT scores in admissions "…were not adopted for racial discriminatory purposes and were reasonable, educationally sound and racially neutral" (674 F.Supp. 1523, (N.D. Miss. 1987)).

The ACT is not the only test to come under fire for its bias against protected classes. The SAT has also come under fire. In *Sharif v. New York State Education Department* (709 F.Supp. 345(S.D.N.Y. 1989)), the court ruled that "the SAT discriminates against female(s)…because it underpredicts academic performance for females as compared to males" (Vaseleck, 1994).

In response to concerns involving the bias of standardized tests regarding protected classes, the courts have basically said that standardized tests should not be the sole criteria for admission into a university (*Ayers v. Fordice*, 879 P. 2d 224, (Kan. 1995)). This is of special concern when considering the fact that in a survey of the

College Board and the American Association of Collegiate Registrars and Admissions Officers, 44% considered test scores as a very important or the single most important factor in admissions decisions (Schaffner, 1985).

What Standardized Tests Can and Cannot Do in Light of the Case Law

The purpose of most standardized tests for admissions is to predict some level of academic success over a limited amount of time. The problem is, these tests have a very limited ability to predict any academic success, especially in the protected groups described above. For instance, the SAT is supposed to be able to predict freshman grades. However, the SAT only predicts about 16% of the variance of freshman grades. A student's high school class rank or high school record is a better predictor of freshman year performance (Sacks, 1997). The practice of using the SAT as the most important or a very import criterion for admission does not fit well with the decision in *Eiseman v. State of New York* (489 N.Y. S.2d 957, (N.Y.A.D. 4 dept. 1985)). Using SAT scores in the criteria *would not* select students who would have the best likelihood of successful matriculation because class rank and/or high school record are a much better predictor (Sacks, 1997).

The same can be said about the GRE. The purpose of the GRE is to predict graduate school performance.

Unfortunately, only 6% of the grades in graduate school can be predicted by the GRE. Undergraduate grades are a better predictor of graduate school performance (Sacks, 1997). An admissions counselor may be better off using social security numbers to predict graduate school performance than using the GRE. When considering *Cannon v. University of Chicago* (709 F.Supp. 361, (S. Ct. 1979)), administrators should see that there is *not* a reasonable relationship between what universities practice, using the GRE, and their conceded purpose, predicting graduate school success (Vaseleck, 1994).

The predictive validity of these tests or lack thereof *should* have great implications for administrators. This is especially true when considering the protected classes under the equal protection clause. Standardized tests are even a worse predictor for women and minorities (Sacks, 1997). It is disheartening to know that women and minorities earn better grades in college than their test scores predict (Sacks, 1997) and that 44% of the survey respondents described above consider these scores to be the most important or a very important criteria for admission (Schaffner, 1985). The result of the practice of using standardized tests in admissions is that fewer women and minorities are accepted than if admissions decision makers looked at only their academic records (Sacks, 1997). When

considering *Phelps v. Washburn University* (634 F.Supp. 556, (D. Kan. 1986)), using standardized tests as the most important or a very important criterion for admission could be considered *discriminatory and unreasonable*.

There are legitimate litigious concerns over the use of standardized tests. First, women, minorities, members of lower economic classes do not perform as well on standardized tests as their white male upper middle class counterparts (Vaseleck, 1994). Second, standardized tests have far less predictive validity for these protected groups. Though ETS is making an effort to close the gap between ethnic and gender groups (Chenoweth, 1996), there is no compelling state interest to continue the use of these tests. In fact, there should be a compelling state interest to stop the use of these tests.

If standardized tests are not a useful predictor of academic success, then what would be the utility of these tests? Sacks said it best; "scoring high on standardized tests is a good predictor of one's ability to score high on standardized tests" (Sacks, 1997, p. 27).

Implications for Administrators

For administrators to protect themselves from future litigation it would behoove them not to use standardized

tests as the most important or even a very important reason for admission. Otherwise, they may find that they are discriminating against certain legally protected classes (Vaseleck, 1994). It would be wiser instead to use academic record as their most important predictor for academic success or matriculation.

If administrators cannot help themselves from using standardized test scores, they should be sure that they are not misusing the test scores. For instance, some universities, who shall remain nameless, use percentile ranks from standardized tests in their admissions formulas. According to Thompson, "policy requiring the adding of percentile ranks are fraught with arbitrariness, because one is inherently invoking 'rubberized' measurement scales in making these judgements…" (Thompson, 1993, p. 29). Therefore, the practice of using percentile ranks in an admissions formula would, in and of itself, strictly on its face, be a violation of the due process standard that admissions decisions should not be arbitrary (*North v. West Virginia Board of Regents*, 332 S.E.2d 141, (W.Va. 1985), *Enns v. Board of Regents of University of Washington*, 650 P.2d 1113, (Wash. App. 1982), *Matter of Levy*, 450 N.Y. S.2d 574, (N.Y.A.D. 1982), and *Phelps v. Washburn University of Topeka*, 634 F.Supp. 556, (D. Kan. 1986)).

Summary

Standardized testing in college admissions has had a long and tumultuous history, especially in the area of predictive validity. The outcries over the predictive validity of these tests are just and should have serious implications for administrators. In light of the case law, administrators need to take steps to ensure the application of standardized tests to their admissions policies does not violate any person the right to due process and equal protection under the law. Otherwise, administrators and their respective universities may be the target of a lawsuit.

References

Ayers v. Allain, 674 F.Supp. 1523, (N.D. Miss. 1987).

Ayers v. Fordice, 879 P. 2d 224, (Kan. 1995).

Betts v. Rector and Visitors of University of Virginia, 939 F.Supp. 461, (W.D.Va. 1996).

Cannon v. University of Chicago, 709 F.Supp. 361, (S. Ct. 1979).

Chenoweth, K. (1996, September). SAT, ACT scores increase. Black Issues in Higher Education, 6-9.

Eiseman v. State of New York, 489 N.Y. S.2d 957, (N.Y.A.D. 4 dept. 1985).

Enns v. Board of Regents of University of Washington, 650 P.2d 1113, (Wash. App. 1982).

Grove v. Ohio State University, College of Veterinary Medicine, 424 F.Supp. 377, (U.S.D.C. S.D. Ohio, E.D., 1976).

Groves v. Alabama State Board of Education, 776 F.Supp. 1518, (U.S.D.C., M.D. Alabama, N.D. 1991).

Haney, W. (1981, October). Validity, Vaudeville, and values: A short history of social concerns over standardized testing. American Psychologist, 36(10), 1021-1034.

Harrington, P. J. (1980, October). Criticisms of standardized admissions testing: A historical perspective. Paper presented at the Northeastern Educational Research Association Annual Convocation, Ellenville, NY.

Hoffman, B. (1961, March). The tyranny of multiple choice tests. Harper's, 222, 37-44.

Knight v. State of Alabama, 787 F.Supp. 1030, (N.D. Ala. 1991).

Martin v. Helstad, 578 F.Supp. 1473,(D.C. Wis. 1983).

Matter of Levy, 450 N.Y. S.2d 574, (N.Y.A.D. 1982).

North v. West Virginia Board of Regents, 332 S.E.2d 141, (W.Va. 1985).

Phelps v. Washburn University of Topeka, 634 F.Supp. 556, (D. Kan. 1986).

Sacks, P. (1997, March/April). Standardized testing: Meritocracy's crooked yardstick. Change, 29(2), 24-31.

Schaffner, P. E. (1985, January/February). Competitive admissions practices when the SAT is optional. Journal of Higher Education, 56(1), 56-72.

Sharif v. New York State Education Department (709 F.Supp. 345(S.D.N.Y. 1989).

Thompson, B. (1993, November). GRE percentile ranks cannot be added or averaged: A position paper exploring the scaling characteristics of percentile ranks, and the ethical and legal culpabilities created by adding percentile ranks in making high-stakes admissions decisions. Paper presented at the annual meeting of the Mid-South Educational Research Association, New Orleans.

U. S. Constitution, Amendment XIV.

Vaseleck, J. (1994). Stop working and put down your pencils: The use and misuse of standardized admission tests. Journal of College and University Law, 20(4), 405-415.

Wirsing v. Board of Regents of University of Colorado, 739 F.Supp. 551, (D. Colo. 1990).